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IN THE

# Supreme Court of the United States

October Term, 1937.

No. [redacted] 22

UNITED STATES OF AMERICA,
*Petitioner*,

*vs.*

ONTINENTAL NATIONAL BANK AND TRUST COMPANY, a Corporation, Trustee Under the Last Will and Testament of James Duggan, Deceased, et al.,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Herbert Pope,
*Counsel for Continental National Bank and Trust Company of Chicago, Solely as Trustee under Will of James Duggan, Deceased, for the children of Timothy Duggan.*

pril 27, 1938.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

## INDEX.



### CITATIONS.

IN THE

# Supreme Court of the United States

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No. 934

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UNITED STATES OF AMERICA,

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CONTINENTAL NATIONAL BANK AND TRUST COMPANY, a Corporation, Trustee Under the Last Will and Testament of James Duggan, Deceased, et al.,

*Respondents.*

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The affidavit of service of notice of the filing of a petition for writ of certiorari in this cause in this court states that the notice was mailed to the undersigned as "attorney of record for the respondent." The word "respondent" is no doubt used advisedly, because the death of Henry Duggan on October 16, 1937, which is hereby suggested, removed him and the trust for his benefit from the case, and the record filed in this court not only shows no substitution of the personal representative of Henry Duggan but there is no means by which the persons whose interests in the trust property vested on Henry Duggan's death, under paragraph (8) of the will of James Duggan (R. 11), can be

brought into this proceeding. The bill in this cause does not reach them, and, as to the trustee of that trust, the cause of action was against the trust company solely as trustee and necessarily terminated with the termination of the trust and with the trust company's ceasing to be a trustee thereof.

It is true, therefore, that there is in this court only one real respondent, and that is the trustee of the $50,000 trust under James Duggan's will for the benefit of Timothy Duggan and his children. It is on behalf of that trust that this answer is filed, and in that connection the death of Timothy Duggan on September 4, 1935, is also hereby suggested, though that death does not change the position of that trust or of the trustee.

The bill in this case named as defendant Continental National Bank and Trust Company, "a corporation organized and existing under the laws of the State of Illinois." (R. 2.) No such national bank could, of course, have any existence. The trustee is described in paragraph (3) of James Duggan's will (R. 10) as "Continental National Bank and Trust Company of Chicago, a corporation organized under the laws of the United States of America," and, so far as the trust for the children of Timothy Duggan is concerned, it is for that trust company that this answer is filed.

It is submitted that, under the rules of this court governing petitions for writs of certiorari, there is no ground for the granting of the writ in this case. If the Revenue Act of 1928 applies, because this case involves a proceeding against a transferee of a transferee, as the Circuit Court of Appeals has held, the rules of this court do not provide for a review of that decision, inasmuch as there is no contrary decision of any other Circuit Court of Appeals on that question. If, on the other hand, the Revenue Act of

1926 applies, there is still no ground for the granting of the writ, inasmuch as the decision of this court in the case of *United States* v. *Updike*, 281 U. S. 489, would then lead also to the conclusion that the bill was properly dismissed, as we shall show. Before doing this, however, we think this court should have a better understanding of the history of this strange case than is disclosed by the petition.

## History of the Case.

In view of the fact that the proceedings in the Board of Tax Appeals in the case of James Duggan have been brought to the attention of this court by the allegations in the bill, we call attention to the reported proceedings in that case. The proceedings before the Board (18 B. T. A. 608) show that the transaction involved in this case occurred in 1920 by reason of a sale of coal mining property which had belonged to the Johnston City and Big Muddy Coal and Mining Company. The stock of that company had been owned by four brothers and sisters, but before 1920 the stock had been transferred to trustees, under a written trust instrument, to be held for their benefit and the survivor of them. In 1920 there was an opportunity to sell the principal mine owned by the company. At that time decisions and statements of this court justified the belief that increase in the money value of property was not taxable income in the years in which the increase occurred or in the year of the sale. *Lynch* v. *Turrish*, 247 U. S, 221, 230. However, out of an abundance of caution, the mine in question was conveyed to the trustees owning the stock of the corporation, and, as contended in the Board proceeding, was not sold by the corporation.

Unfortunately, the case was heard by a member of the Board of Tax Appeals who was not a lawyer, as his opinion clearly shows, 18 B. T. A. 608. In holding that the corpo-

ration realized a taxable gain he ignored altogether the existence of the written trust instrument, although the Commissioner and the Board already had recognized its existence and effect when the question of an estate tax arose on the death of one of the beneficiaries. (*Hanna Duggan Estate*, 6 B. T. A. 1098; 8 B. T. A. 482.)

The corporation was dissolved in 1921. (R. 6.) It was an Illinois corporation and, under the laws of that state, its existence for the purpose of being sued was continued only for two years after dissolution. The assessment for the tax liability claimed in this case was not made against the corporation until 1925. (R. 5.) If the assessment was effectual, then the period of limitation for the commencement of suits to collect the tax claimed expired six years after the assessment, or in 1931. (Section 278(d) of Revenue Act of 1926.) If the assessment was of no effect, then the period of limitation expired five years after the return was filed, or in 1926. (Section 277(a)(3) of Revenue Act of 1926.)

The bill of complaint in this case was filed on May 6, 1932. A motion to dismiss was filed by certain defendants January 16, 1933. (R. 17.) Four years later, on January 11, 1937, the complainant confessed the motion to dismiss its bill (R. 19), and, on leave granted, amended its bill of complaint for the sole purpose of alleging the making of a jeopardy assessment on February 14, 1931, against James Duggan, who had died about two years before, on March 1, 1929. (R. 20, 22.) The motion to dismiss was renewed to cover the bill as amended. (R. 19.)

The only basis for this jeopardy assessment against a dead man was a decision or order entered in an *ex parte* proceeding before the Board of Tax Appeals after James Duggan's death. The Board proceeding shows that Michael Duggan as well as his brother James Duggan ap-

pealed to the Board on account of a determination by the Commissioner of the same tax liability. Michael Duggan died before James Duggan, and the Board determined after their deaths that Michael Duggan was not liable while James Duggan was, on some theory that he individually, instead of the trustees owning the stock, got all the proceeds of the sale.

When the Board filed its opinion on January 6, 1930, James Duggan had been dead since March 1, 1929, and his former counsel on April 9, 1929, had filed a suggestion of his death. See 21 B. T. A. 740, where the proceedings in the Board between December 10, 1928, and December 16, 1930, the date of the Board's "memorandum," are fully set forth and indicate, as was the fact, that James Duggan's former counsel, Mr. Prettyman, definitely retired from the case upon filing the suggestion of Duggan's death. It is clear that the Board proceeded with the case and filed its findings of fact and opinion on January 6, 1930, and its final computation and determination on January 27, 1931, *ex parte,* with only the Commissioner represented before it. The jeopardy assessment against James Duggan, deceased, based upon the determination of the tax by the Board, was made February 14, 1931, within sixty days after the Board's decision, and therefore during the time, according to petitioner, that the right to make an assessment was suspended.

James Duggan was the survivor of the original four owners of the stock of the coal company. Since then two other brothers, Timothy and Henry, have died.

## There Is No Ground for the Issuance of the Writ of Certiorari.

The original bill of complaint was based upon the trust fund theory and sought to collect a tax, alleged to be due from the corporation, from transferees of a transferee of corporate funds. The confession of the motion to dismiss the bill of complaint in 1937 was an admission that, in view of the decision of this court in the *Updike* case, *supra,* the original bill stated no cause of action. The amended bill of complaint did nothing but add the jeopardy assessment against James Duggan which was made nearly two years after his death. That even counsel for petitioner had little confidence in the efficacy of this assessment is indicated by the fact that in a little more than a month from the time the bill was amended six years would have expired since the assessment was made. It was obviously a last resort at the eleventh hour, and, as we shall show, has nothing to do with the cause of action stated in the bill against the respondent.

There are two reasons why the amended bill of complaint does not improve the position of petitioner. In the first place, the cause of action stated in the bill was already barred under the *Updike* decision, before the jeopardy assessment was made, and the jeopardy assessment, even if it had any validity, could not revive a cause already lost.

In the second place, the jeopardy assessment against James Duggan, deceased, has no relation to the cause of action stated in the bill of complaint against the respondent.

1. The first reason is made clear by the opinion of this court in the *Updike* case, *supra.* That decision is based upon the conclusion that if "the period of limitation had run in favor of the corporation, it had run in favor of the transferees," so far as a suit against them was concerned.

It is not questioned that the period of limitation for suit against the corporation in this case had expired either in May, 1926, or in January, 1931. Therefore, suit against this respondent as a transferee was barred before this suit was begun in 1932.

In the Circuit Court of Appeals counsel for petitioner sought to avoid this conclusion by insisting that respondent was not a transferee of the corporation at all. It was contended that respondent was merely a transferee of James Duggan and that the liability of James Duggan was somehow a liability independent of the asserted tax liability of the corporation. This theory was obviously in conflict with all the allegations in the bill of complaint which asserted the liability of the corporation for taxes and prayed that the defendants be accountable to the plaintiff "for the aforesaid taxes." "Taxes as aforesaid" were not James Duggan's taxes but the corporation's taxes. (R. 6, 9).

This theory is abandoned in the petition for writ of certiorari, possibly in the hope of avoiding the conclusion of the Court of Appeals that this case is governed by the Revenue Act of 1928. It is now contended by the learned Solicitor General that the respondent is, in fact, the original transferee of the corporation appearing in a representative capacity for James Duggan, and therefore petitioner "does not seek to subject the trustee to liability as a transferee of a transferee." (Petition, p. 11.)

This is certainly the most astonishing proposition yet advanced in this case. It leaves Henry Duggan and the other individual defendants entirely out of the case. Now that Henry Duggan is dead this may be as well, and so also as to those now vested with ownership of the property formerly held in trust for Henry Duggan. As to this respondent now acting as trustee for Timothy Duggan's children the contention is wholly untenable.

Surely a testamentary trustee who takes property as a legatee under a will does not act in a "representative capacity" for the decedent. Such a trustee under James Duggan's will is just as much a transferee of James Duggan as Henry Duggan was. The trustee for Henry Duggan was in the same position as to the trust property that Henry Duggan was as to the property given to him outright. The same thing is true of this respondent as the trustee for the children of Timothy Duggan.

The learned Solicitor General has evidently forgotten about the case of *Hulburd* v. *Commissioner*, 296 U. S. 300, in which this court held that a proceeding against an executor as the personal representative of the decedent, a transferee of the corporate taxpayer, could not be treated as a proceeding against the executor as a legatee.

It is impossible, therefore, to escape from the decision in the *Updike* case, *supra*, by this contention now made in the petition for writ of certiorari. It is clear that this suit against this respondent as well as against Henry Duggan is a suit against transferees of a transferee of the corporate taxpayer, and, since suit against the taxpayer is barred it is barred also against this respondent as a transferee. It is not necessary to consider what the result might have been if a suit had been brought against the personal representative of James Duggan. And it is clear also that the decision of the Court of Appeals in this case is not inconsistent with the decision of this court in the *Updike* case, as the petitioner suggests (p. 15).

The petitioner also claims (p. 15) that *Helvering* v. *Newport Company*, 291 U. S. 485, is inconsistent with the decision of the Court of Appeals in this case. That case, however, was an appeal from a Board proceeding under Section 280. Section 278(d) was not mentioned and was in no way involved. The transferee had given a waiver

which extended the period for assessment against it beyond the time when the 60-day notice of transferee liability was mailed to it. The provision of Section 278 which the court held applicable to this transferee proceeding was 278(c), which provides:

> "(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment, the tax may be assessed at any time prior to the expiration of the period agreed upon."

In other words, Section 278(d) cannot be said to have been actually applied to Section 280 in the *Updike* case, because it was not a proceeding under Section 280, nor in the *Newport* case, because Section 278(d) was neither mentioned nor in any way involved.

In this connection the petitioner says (p. 17) that the decision below also conflicts with *City National Bank* v. *Commissioner*, 55 F. (2d) 1073. This also was an appeal from a Board proceeding under Section 280. The Board proceeding was timely under 280 (b) (1), but the bank contended that there had to be an assessment against its transferor. The period for starting such a proceeding under 280 (b) (1) is one year after the expiration of the period for assessment against the transferor. That does not mean, however, that an assessment against the transferor is a prerequisite, and the court so held. No question regarding the position of a transferee of a transferee was presented in that case.

2. The amended bill of complaint did not change the cause of action against this respondent and when the complainant confessed the motion to dismiss the original bill it confessed the amended bill as well. The liability of the defendants on account of the tax claimed against the corporation was just the same after as before the amendment, and the amended bill was therefore properly dismissed.

It is clear that the Board proceeding involving James Duggan did not suspend the right to bring a suit against the respondent as a transferee of the coal company. A suit could have been commenced against it before the entry of what petitioner claims was the final order in the Board proceeding. The property in the James Duggan estate could have been and in fact was transferred in due course some months before January, 1931. No claim was filed in the probate court in Florida within the proper time or at any time in the James Duggan estate asserting liability for the tax claimed against the coal company. Accordingly, the property in the estate was transferred in due course to the legatees under James Duggan's will. These legatees had no right to appear even voluntarily in the Board proceeding.

If suit against the taxpayer, the coal company, was barred in 1926, then a suit brought against this respondent as transferee in 1930 would have been barred also under the decision in the *Updike* case, *supra*, even though no final order had been entered in the Board proceeding. The entry of a so-called final order by the Board in January, 1931, and the making of a jeopardy assessment against James Duggan in February, 1931, could have no effect upon a suit already brought against respondent. The result must be the same as to this suit actually brought against respondent in 1932. There cannot be two periods of limitation with reference to the same cause of action against the same party.

This should be a complete answer to the contention of petitioner in this case. In addition to that, however, it seems incredible that the Commissioner can keep a proceeding in the Board alive for an indefinite period when the Commissioner is the only party to the proceeding. Either such a proceeding abated at the death of the other

party, if no personal representative was substituted within a reasonable time, or the proceeding must be still pending. There could be no valid final decision against a dead person. For the same reason neither a jeopardy assessment nor any other assessment against a dead person, based upon an *ex parte* decision, could be of any legal effect. Certainly it could be of no effect as to another transferee. Whether a jeopardy assessment against a dead person could under some circumstances be of some effect in connection with a proceeding against the personal representative of such decedent we need not inquire. A jeopardy assessment against a person who has been dead two years has a suggestion of humor but not of due process of law.

When the Commissioner and the Board elected to proceed without any other party, and when *ex parte* decisions and orders were rendered against the decedent, there was no longer an adversary proceeding pending and that case must be treated as having abated upon the death of James Duggan. If that is so, then even the jeopardy assessment came too late for any purpose.

There is another curious feature to this jeopardy assessment. It is contended that the period for assessment against James Duggan was suspended during the Board proceeding and until sixty days after the so-called final decision of the Board. Yet the jeopardy assessment relied on was made during this alleged period of suspension. If a jeopardy assessment can be made at any time within the prescribed period in the unlimited discretion of the Commissioner, then it is nonsense to claim that there is any suspension of the period for assessment. Either a jeopardy assessment is a special kind of assessment, and there is no period during which the making of such an assessment is suspended, or the provision for the suspension of assessments is utterly meaningless. If the right to make a jeop-

ardy assessment is never suspended, then in this case the time for making a jeopardy assessment had expired on May 16, 1927, almost four years before it was made. There is no provision in the statute which gives a longer period for the making of jeopardy assessments than other assessments, and if the period of suspension does not apply to jeopardy assessments then the period for making a jeopardy assessment must expire without reference to any period of suspension. Otherwise the statute as it stands does not make sense.

It may be that a final determination of lack of jurisdiction by the Board of Tax Appeals in a case in which the taxpayer as well as the Commissioner are represented would be a final decision which would end the period suspending the right to assess. See *American Equitable Assurance Co.* v. *Helvering,* 68 F. (2d) 46. But where the taxpayer dies and no one is substituted as a party the Commissioner would be in control of the litigation and might postpone a final decision for many years. At the end of that time, according to petitioner, a jeopardy assessment could be made against a taxpayer long dead and within six years a suit could be begun against a transferee of the decedent. This process could be repeated indefinitely with successive transferees. A statute intended to be a statute of repose would provide no repose whatever.

We submit that whether the Revenue Act of 1928 or the Revenue Act of 1926 is held to apply, there is no basis for the granting of a writ of certiorari in this case. No cases have been cited by petitioner which show any conflict of decisions on the vital questions involved in this case. The petitioner has changed its own theories several times and certainly the last theory presented in its petition is one which finds no support in any decision. One generation of the Duggan family has been pursued to the grave by the

tax collector without any reasonable justification. There is no good ground for pursuing another generation in the same fashion. Eighteen years should be enough for any tax case, particularly when it involves the determination of the when, how and why of a so-called realized gain in the case of several persons no longer living.

Respectfully submitted,

HERBERT POPE,

*Counsel for Continental National Bank and Trust Company of Chicago, solely as Trustee under Will of James Duggan, deceased, for the children of Timothy Duggan.*